162

(5)

Supreme Court, U.S.
FILED
MAY 20 2010
OFFICE OF THE CLERK

No. 09-1262

In The

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KUONG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,

Petitioners,

—v.—

TALISMAN ENERGY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR EARTHRIGHTS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MARCO B. SIMONS
Counsel of Record
marco@earthrights.org

RICHARD L. HERZ
JONATHAN G. KAUFMAN
EARTHRIGHTS INTERNATIONAL
1612 K STREET NW, SUITE 401
WASHINGTON, DC 20006
(202) 466-5188

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. This Is an Appropriate Case to Address the Question of Accessory Liability in Alien Tort Statute Cases 5

II. Federal Common Law Governs Accessory Liability in Alien Tort Statute Cases 8

A. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases 9

B. International law itself supports the application of domestic law 13

C. Courts generally look to federal liability rules to effectuate federal causes of action 17

D. Congress' original understanding of the Alien Tort Statute mandates application of general common-law rules of liability 18

1. Because the law of nations was incorporated into the common law, general common-law rules of liability apply 19

2. The original intent of the ATS suggests application of general common law rules of liability . 20

III. Under Federal Common Law, Aiding and Abetting Liability Requires Knowing, Substantial Assistance 23

IV. Under Federal Common Law, Conspiracy Requires Evidence of Participation in a Plan With Knowledge of its Unlawful Aims, and Foreseeable Injuries 25

CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

Federal Cases

Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) 12

American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) 6

Beck v. Prupis, 529 U.S. 494 (2000) 25

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 18

Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998) 17

Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) 2, 12, 23, 26-27

Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115 (D.D.C. 2003) 12

Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) . . . . . 5, 12-13 & n.7

Doe v. Unocal Corp., No. 00-56603, Order (9th Cir. Apr. 9, 2003) (*en banc*). 13 n.7

Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997) 13, 26

Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983) 18

Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) 25, 27-28

Hartford Accident & Indemnity Co. v. Sullivan, 846 F.2d 377 (7th Cir. 1988) 28

Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) 26

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) . . . . . 11, 13 & n.8, 16

Khulumani v. Barclay National Bank Ltd., 504 F.3d 254 (2d Cir. 2007) . . . . . *passim*

Pittman v. Grayson, 149 F.3d 111 (2d Cir. 1998) . 22

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) . *passim*

Project Hope v. M/V Ibn Sina, 250 F.3d 67 (2d Cir. 2001) 17

Sarei v. Rio Tinto PLC, 487 F.3d 1193 (9th Cir. 2007) 5, 12

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) . . . . . *passim*

Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004) 18

In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005) 26

United States ex rel. Durcholz v. FKW, Inc., 189 F.3d 542, 545 n.3 (7th Cir. 1999) 25 n.17

Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002) 22

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) 12

Federal statutes and public laws

Alien Tort Statute, 28 U.S.C. § 1350 . . . . . *passim*

28 U.S.C. § 2109 6

Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174 (2007) 7 n.3

Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344 (2006) 7 n.3

Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497 (2004) 7 n.3

Sudan Peace Act, Pub. L. No. 107-245 (2002) . . 7 n.3

Act of Mar. 3, 1819, ch. 77, 3 Stat. 510 ..... 25 n.16

Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 24

State cases

Purviance v. Angus, 1 U.S. (1 Dall.) 180 (Pa. 1786) 23

Richardson v. Saltar, 4 N.C. 505 (1817) 23 n.14

State ex rel. Mays v. Ridenhour, 248 Kan. 919 (1991) 28-29

State v. McDonald, 14 N.C. 468 (1832) 23 n.14

International treaties

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 ..... 15 n.10

Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 3 ..... 15 n.11, 16 n.12, 17-18

U.K. cases

De Francesco v. Barnum, (1890) 45 Ch.D. 430) 24 n.15

BMTA v. Salvadori, [1949] Ch. 556 ..... 24 n.15

Midland Rollmakers Ltd. v. Collins, (1981) The Times, 18 June (Ch.) 24 n.15

Petrie v. Lamont, (1842) 174 Eng. Rep. 424 (Assizes) 20 n.13

Roger de A., Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) 20 n.13

Yarborough and Others v. The Governor and Company of the Bank of England, (1812) 104 Eng. Rep. 991 (K.B.) 20 n.13

Congressional resolutions

S. Res. 684, 110th Cong. (2008) (enacted) 7 n.3

H.R. Res. 740, 110th Cong. (2007) (enacted) . . . 7 n.3

S. Res. 631, 109th Cong. (2006) (enacted) 7 n.3

H.R. Res. 333, 109th Cong. (2005) (enacted) . . . 7 n.3

S. Con. Res. 137, 108th Cong. (2004) (enacted) . 7 n.3

H.R. Res. 194, 108th Cong. (2003) (enacted) . . . 7 n.3

S. Res. 109, 106th Cong. (1999) (enacted) 7 n.3

S. Res. 267, 105th Cong. (1998) (enacted) 7 n.3

H.R. Res. 515, 104th Cong. (1996) (enacted) . . . 7 n.3

S. Con. Res. 140, 102nd Cong. (1992) (enacted) 7 n.3

S. Con. Res. 15, 101st Cong. (1989) (enacted) . . 7 n.3

Presidential statements

President's Statement on Sudan Strategy (Oct. 19, 2009) 8 n.5

President's Letter to Congressional Leaders on Blocking Property of and Prohibiting Transactions with the Government of Sudan (Oct. 13, 2006) 8 n.5

President's Statement on the Fighting in the Darfur Region of Sudan (Apr. 7, 2004) 8 n.5

President's Message to the Congress on the Continuation of the National Emergency With Respect to Sudan (Oct. 31, 2001) 8 n.5

President's Message to the Congress on Sudan (May 5, 1998) 8 n.5

President's Message to the Congress on Sudan (Nov. 3, 1997) 8 n.4

Restatements, treatises, briefs, and law review articles

M. Cherif Bassiouni, *An appraisal of the growth and developing trends of international criminal law*, 45 Revue Internationale de Droit Penal 405, 429 (1974) 14-15

Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587 (2002) 19

Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989) 24-25

Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99 (2004) 22

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221 (1996) 19-20, 21

John G. Fleming, The Law of Torts (8th ed. 1993) 24

Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1 (1985) 21

Restatement (Second) of Torts § 876 (1977) 23

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has represented plaintiffs in several lawsuits under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for, *inter alia*, aiding and abetting security forces in carrying out torture and extrajudicial killings. *E.g. Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.); *In re Chiquita Brands Int'l, Inc., Alien Tort Statute & Shareholder Derivative Litig.*, No. 08-MD-01916 (S.D. Fla.).

Amicus therefore has an interest in ensuring that the courts apply the correct body of law and substantive standards to questions of accessorial liability under the ATS. *Amicus* addressed issues

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amicus* made such a monetary contribution. All parties have consented to the filing of this brief and such consents have been lodged with the Court. Counsel for Petitioners received timely notice of intent to file this brief; counsel for Respondents received such notice eight days prior to the filing, but has waived the ten day notice requirement of Rule 37.2(a).

regarding the application of federal common law in ATS cases in an *amicus* brief to the panel below, and participated in oral argument at the Second Circuit's invitation.

SUMMARY OF ARGUMENT

The court below, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), addressed at least three important questions about which the Circuits have disagreed. First, it held that international law provides the proper source of law for assessing accessory liability under the ATS. Second, it held that aiding and abetting requires a purpose to assist the underlying violation of international law. Third, it held that the same *mens rea* applies to liability for civil conspiracy. The Eleventh Circuit reached different results with respect to each question: applying federal common law, it assessed plaintiffs' aiding and abetting claims under a "knowledge" *mens rea* standard, and concluded that liability for civil conspiracy could be found where the evidence showed that the defendant joined the conspiracy knowing its unlawful goals and could foresee the torture and murder of the victim. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-60 (11th Cir. 2005). The Eleventh Circuit is correct on all three counts.

Certiorari should be granted to resolve these

splits. The Second Circuit's methodology is at odds with this Court's approach in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and with the Framers' intent in drafting the ATS. Moreover, the Second Circuit created new complicity liability standards that cannot be reconciled with ordinary federal common-law tort principles, and which would unjustifiably immunize from liability persons who knowingly assist the most heinous abuses, such as genocide and crimes against humanity. It is appropriate for this Court to address these issues now in order to give guidance to other courts considering similar cases.

The panel below erred by failing to recognize that well-developed common-law rules govern the standards for liability for claims brought under the ATS. The plain language of *Sosa* makes clear that the ATS gives jurisdiction to federal courts to recognize causes of action at federal common law for violations of the law of nations. 542 U.S. at 724. Thus, the dividing line between those issues governed by international law and those by domestic law is clear: international law controls the question of whether a plaintiff's rights have been violated, but because the cause of action itself is derived from the common law, not international law, federal common law governs all other issues. In particular, courts look to federal common law in crafting the remedy, including the liability standards for those alleged to

be complicit in the violation.

International law itself compels the same conclusion. By design, it leaves to domestic law the task of defining the remedies available for international law violations rather than purporting to delineate their scope. The liability rules applicable to defendants allegedly complicit in such violations are a matter for the United States to decide in creating the cause of action, not an issue governed by international norms.

Furthermore, the original intent of the First Congress, which enacted the ATS, would have been to apply rules of liability drawn from general common law, which was understood to incorporate the law of nations. In the early years of the United States, courts regularly interpreted the law of nations and applied general common-law principles to attribute liability.

Applying these general common-law principles, the *mens rea* element for aiding and abetting is knowledge that the acts will substantially assist the tort. Purpose is not required; the defendant need not affirmatively wish the tort to occur.

Finally, also under general common-law principles, liability for civil conspiracy may be found where the evidence shows that a defendant

knowingly and willingly participated in a wrongful plan, regardless of whether the defendant acted with the specific purpose to advance the illegal conduct that injured the plaintiff.

ARGUMENT

I. This Is an Appropriate Case to Address the Question of Accessory Liability in Alien Tort Statute Cases.

Six years ago, the *Sosa* Court held that the ATS's jurisdictional grant was "enacted on the understanding that *the common law* would provide a cause of action" for certain international law violations. 542 U.S. at 724 (emphasis added). Both before *Sosa* and after, courts wrestled with the manner in which common-law rules and norms of international law interrelate in ATS cases, although for various reasons several of these cases produced no precedential decisions. *See, e.g.*, *Doe v. Unocal Corp.*, 395 F.3d 932, 947-48 (9th Cir. 2002), *vacated by grant of reh'g en banc*, 395 F.3d 978 (9th Cir. 2003); *id.* at 964-69 (Reinhardt, J., concurring); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007), *vacated by grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007), *limited remand on other grounds*, 550 F.3d 822 (9th Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 268-70 (2d Cir. 2007)

(Katzmann, J., concurring); *id.* at 286-87 (Hall, J., concurring). Indeed, although these issues previously arose and were brought before this Court in a petition seeking review of *Khulumani*, the Court was precluded from addressing the question due to lack of a quorum in that case, resulting in an affirmance as if by an equally divided Court pursuant to 28 U.S.C. § 2109. *See Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).[2]

One judge has stated that "*Sosa* at best lends Delphian guidance on the question of whether the federal common law or customary international law represents the proper source from which to derive" rules of accessory liability. *Khulumani*, 504 F.3d at 286 (Hall, J., concurring). Given the conflicts regarding interpretation of *Sosa*, it is appropriate for this Court now to step in to clarify the issue and resolve the circuit split.

Moreover, the issue of what substantive liability standards apply is important, and should be resolved quickly. The Second Circuit's rule would immunize from ATS liability those who knowingly

---

[2] All of the Justices who took no part in the consideration of this petition remain members of the Court, suggesting that the Court would continue to lack a quorum in the *Apartheid* litigation.

assist genocide and crimes against humanity, whenever they are motivated by profit rather than malice, despite the fact that such knowing assistance suffices for liability for ordinary common-law torts.

Finally, the significance of the instant case also militates in favor of resolving the conflict now. Sudan has long been one of the most notorious locations of severe human rights abuses; the human rights and humanitarian situation in Sudan has been the subject of dozens of actions by Congress over the past two decades, including at least four public laws specifically directed toward Sudan.[3] President Clinton declared a national emergency in response to the threats to U.S. foreign policy posed by Sudan, including "its abysmal human rights

---

[3] *See, e.g.*, Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174 (2007); Darfur Peace and Accountability Act of 2006, Pub. L. No. 109-344 (2006); Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497 (2004); Sudan Peace Act, Pub. L. No. 107-245 (2002); *see also, e.g.*, S. Res. 684, 110th Cong. (2008); H.R. Res. 740, 110th Cong. (2007); S. Res. 631, 109th Cong. (2006); H.R. Res. 333, 109th Cong. (2005); S. Con. Res. 137, 108th Cong. (2004); H.R. Res. 194, 108th Cong. (2003); S. Res. 109, 106th Cong. (1999); S. Res. 267, 105th Cong. (1998); H.R. Res. 515, 104th Cong. (1996); S. Con. Res. 140, 102nd Cong. (1992); S. Con. Res. 15, 101st Cong. (1989) (all enacted).

record,"[4] and every recent President has regularly highlighted human rights abuses in Sudan.[5] Accountability for such abuses is a signature human rights issue of our time that deserves attention by this Court.

II. Federal Common Law Governs Accessory Liability in Alien Tort Statute Cases.

The panel below erred by declining to apply uniform federal common-law rules to determine who may be held liable for complicity under the ATS. *See* 582 F.3d at 258-60. Instead, the panel erroneously concluded that *Sosa* requires courts to look to international law rather than federal common law for "accessorial liability" standards. *Id.* at 259. In fact, *Sosa*, international law, the ordinary role of federal common law in giving effect to federal claims,

---

[4] President's Message to the Congress on Sudan (Nov. 3, 1997).

[5] *See, e.g.*, President's Statement on Sudan Strategy (Oct. 19, 2009) (seeking end to "gross human rights abuses"); President's Letter to Congressional Leaders on Blocking Property of and Prohibiting Transactions with the Government of Sudan (Oct. 13, 2006); President's Statement on the Fighting in the Darfur Region of Sudan (Apr. 7, 2004); President's Message to the Congress on the Continuation of the National Emergency With Respect to Sudan (Oct. 31, 2001); President's Message to the Congress on Sudan (May 5, 1998).

and the original understanding of the ATS all suggest that a uniform body of federal common law should be used to decide this question.[6]

A. Following *Sosa*, federal common law provides the rules of liability in Alien Tort Statute cases.

Sosa's holding that federal common law provides the cause of action in ATS cases, 542 U.S. at 724, entails that the scope of ATS complicity liability is defined by the common law. Although ATS claims require that the plaintiff has suffered a violation of a right guaranteed by international law, the ATS provides "jurisdiction over . . . common law causes of action," *id.* at 721, and thus the *remedy* available for the violation of that right is a question of federal common law. *Accord* Pet. at 22-23. The standard applicable to accomplice liability is a question concerning what causes of action are available for a violation of an international law right, not a question of whether a right has been violated. It is therefore determined by federal common law.

Indeed, as noted in Part II.D, *infra*, when Congress passed the ATS it would not have

---

[6] Judge Hall's concurring opinion in *Khulumani*, 504 F.3d at 286–91, sets forth the proper analysis.

recognized any real distinction between international law rules and general principles of law applicable in common-law actions.

The Second Circuit adopted an entirely different approach. It held that international law controls accessorial liability standards because, it concluded, such liability "is no less significant a decision than whether to recognize a whole new tort in the first place." 582 F.3d at 259. *Sosa*, however, did not suggest that the choice of law is determined by the significance of the relevant issue. Nor does the text or purpose of the ATS provide any support for this view.

Sosa's footnote 20, 542 U.S. at 732 n.20, does not support the Second Circuit's view. As Petitioners note, that footnote only addressed the question of state action under international law. Pet. at 20. But because any state action requirement is part of the definition of an international law violation, this inquiry is necessary to determine whether any internationally-guaranteed right has been violated. Certain acts, such as such as crimes against humanity, war crimes or genocide are prohibited regardless of state involvement. *See id.* Other abuses, such as torture, ordinarily only implicate international law when a state is involved in their commission. *See id.* The reason for this distinction

is that not all acts that would be forbidden if committed by a state actor are of sufficiently "universal concern" if committed by a private actor. *See Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995). Footnote 20 is fully consistent with the distinction between the right (defined by international law) and the remedy (provided by domestic law).

Complicity liability standards are completely different. They do not comprise an element of the right which a plaintiff must prove has been violated. Instead they are a matter of the remedy an individual state may provide, an issue that arises only after it is established that the act that injured the plaintiff is of sufficient universal concern to violate international law. Indeed, the panel below explicitly held that conspiracy is *not* a separate, inchoate offense. 582 F.3d at 260. Likewise, the opinions in *Khulumani* rejected the idea that aiding and abetting must be a distinct offense under international law. *See* 504 F.3d at 284 (Hall, J., concurring) (rejecting notion that international law provides the aiding and abetting standard); *id.* at 280, 281 (Katzmann, J., concurring) (aiding and abetting is "a theory of liability for acts committed by a third party," not "an offense in itself"). In short, international law is the source to determine whether there has been a primary violation, but nothing in

Sosa suggests that the question of "who should be held responsible for a particular act," *id.* at 281, is resolved according to international law.

Consistent with this analysis, the Eleventh Circuit has concluded that common-law doctrines determine who may be held responsible in ATS cases. *See Cabello*, 402 F.3d at 1158-59. A similar result was reached by a Ninth Circuit panel before the case was taken *en banc* to address a question of exhaustion of remedies. *See Sarei*, 487 F.3d at 1202 ("Courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law."). Prior to *Sosa*, several other courts suggested that "liability standards applicable to international law violations" should be developed "through the generation of federal common law," an approach that is "consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place." *Xuncax v. Gramajo*, 886 F. Supp. 162, 182–83 (D. Mass. 1995); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (holding that courts may "fashion domestic common law remedies to give effect to violations of customary international law"); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003) (considering the possibility that "[t]ort principles from federal common law" apply to determine liability in ATS cases); *Unocal*,

395 F.3d at 966 (Reinhardt, J., concurring) (arguing that federal common law applies in ATS cases "in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort")[7]; *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (finding ATS liability where "under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions").

B. International law itself supports the application of domestic law.

International law leaves to domestic law "the task of defining the remedies that are available for international law violations." *Kadic*, 70 F.3d at 246.[8]

---

[7] The *Unocal* majority applied international law aiding and abetting standards, but, contrary to the Second Circuit below, found that application of federal common law may be proper in certain circumstances. 395 F.3d at 947 n.20 & 949 n.25. *En banc* review was to focus on "whether Unocal's liability should be resolved according to general federal common law tort principles" or under "an international-law aiding and abetting standard." *Doe v. Unocal Corp.*, No. 00-56603, Order (9th Cir. Apr. 9, 2003) (*en banc*).

[8] *Kadic* equates "creat[ing] private causes of action" with "defining the remedies," 70 F.3d at 246, consistent with the understanding that *Sosa*'s holding that ATS causes of action arise under federal common law necessarily means that the remedy is governed by common law.

Thus, as Petitioners note, international law itself directs the Court to domestic law as the proper source for remedies and thus for accomplice liability standards. Pet. at 21-22. Moreover, "when international law and domestic law speak on the same doctrine, domestic courts should choose the latter." *Khulumani*, 504 F.3d at 287 (Hall, J., concurring).

Because international law does not generally prescribe rules of private civil liability, the Second Circuit was forced to import criminal standards for accessory liability, which are manifestly inappropriate in civil cases. The better approach is to apply established domestic doctrines of civil liability.[9] Indeed, even international criminal law, like customary international law, generally does not prescribe who may be held liable for an offense; it is primarily enforced "subject to the municipal criminal laws of the states who enter the conventions in question." M. Cherif Bassiouni, *An appraisal of the growth and developing trends of international*

---

[9] Of course, if international law and federal law both adopt the same "knowledge" standard, as Petitioners argue, Pet. at 27-33, no choice need be made. But the importation into federal common-law tort cases of a criminal purpose standard that exceeds the federal tort "knowledge" standard is inappropriate.

criminal law, 45 Revue Internationale dc Droit Penal 405, 429 (1974). The exception is the few international criminal tribunals that have been formed, which cover only a handful of international crimes—notably excluding recognized ATS norms such as piracy and state-sponsored torture. These limited international criminal regimes are created by treaties as one means to enforce norms that are already prohibited by customary international law or other treaties.[10] These regimes do not limit the conduct proscribed by, or the remedies available pursuant to, customary international law.[11]

Moreover, they are created with the

---

[10] Genocide, for example was prohibited by both customary international law and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, which entered into force in 1951, long before any international tribunal had the power to prosecute particular instances of genocide.

[11] For example, article 10 of the Rome Statute states that the definitions of crimes should not be read "as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Rome Statute of the International Criminal Court ("Rome Statute") art. 10, *adopted* July 17, 1998, 2187 U.N.T.S. 90. Likewise, article 22(3) notes that limitations on the jurisdiction of the Court "shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

expectation that domestic measures will provide parallel means of enforcing the underlying proscriptions of customary international law. *See Kadic*, 70 F.3d at 240 (for conduct considered international offenses, "international law also permits states to establish appropriate civil remedies"). ATS remedies are not created pursuant to international criminal law; rather, under international law, both international criminal regimes and domestic measures such as the ATS are complementary, parallel enforcement mechanisms. For the nearly 50 years from the Nuremburg Tribunals to the establishment of the Yugoslavia Tribunal in 1993, international criminal law was enforced exclusively through domestic jurisdictions, and even today domestic systems still have the primary enforcement role.[12] Thus, the structure of international law supports the application of domestic rules of civil liability.

---

[12] *See, e.g.*, Rome Statute art. 17(1)(a) (providing that a case is inadmissible before the International Criminal Court if it is "being investigated or prosecuted by a State which has jurisdiction over it").

C. Courts generally look to federal liability rules to effectuate federal causes of action.

As Petitioners note, federal courts nearly always apply preexisting, general tort liability rules to give effect to federal causes of action. Pet. at 24-25 (collecting cases); *accord Khulumani*, 504 F.3d at 287 (Hall, J., concurring); *see also Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 754 (1998) (fashioning "a uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law"); *Project Hope v. M/V Ibn Sina*, 250 F.3d 67, 76 (2d Cir. 2001) (applying federal common law of joint and several liability to federal statutory claims).

Concluding that federal law provides uniform rules of decision does not end the inquiry. A court must also consider what sources to consult in developing such rules. The primary source is preexisting federal principles; any gaps in these principles should be filled by traditional common-law rules, informed by international law as appropriate. If all "significant" issues in ATS cases were governed exclusively by international law, 582 F.3d at 259, rather than by established federal law doctrines, this would lead to absurd consequences. For example, international law does not recognize personal immunities for offenses such as genocide, *see* Rome

Statute of the International Criminal Court, art. 27., July 17, 1998, 2187 U.N.T.S. 3. Doctrines such as head-of-state immunity, government contractor immunity, and even the sovereign immunity of the United States itself are all federal common-law doctrines, not derived from international law. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) (head-of-state immunity); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (government contractor defense); *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) (sovereign immunity). Were courts to apply international law to these undoubtedly significant issues, all of which bear on a defendant's liability, these common-law doctrines would fall away. To avoid this, courts should incorporate into ATS claims settled common-law principles, including civil aiding and abetting liability.

D. Congress' original understanding of the Alien Tort Statute mandates application of general common-law rules of liability.

When Congress passed the ATS, it would have expected that, as with other areas of federal law, general common-law principles would apply in ATS cases.

1. Because the law of nations was incorporated into the common law, general common-law rules of liability apply.

The Second Circuit's suggestion that international law determines all significant issues in ATS cases misapprehends the original understanding of Congress as to the relationship between the law of nations and the common law. When the ATS was enacted, no clear distinction was drawn between the two bodies of law; the common law was considered to have encompassed the law of nations in its entirety. It is thus mistaken to think that Congress would have looked to international law for rules of tort liability—which, of course, it did not and still does not provide. Instead, Congress treated liability arising under the law of nations as it did any other common-law tort and applied general common-law rules of liability. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 595 (2002) ("'American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.'"). Thus, it was understood that a tort in violation of the law of nations would be "cognizable at common law just as any other tort would be." William S. Dodge,

The Historical Origins of the Alien Tort Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221, 234 (1996). Accordingly, as Petitioners note, courts often applied the common law in cases involving the law of nations, including to the issue of the attribution of liability. Pet. at 20-21 & n.27.[13]

2. The original intent of the ATS suggests application of general common-law rules of liability.

As *Sosa* recognized, the First Congress enacted the ATS to give federal courts jurisdiction over tort suits under the law of nations brought by aliens out of concern that the United States was failing to provide a uniform forum for redress of a series of crimes against ambassadors and the

---

[13] As early as 1348, English courts held that one aiding a trespasser, without himself doing another wrong, could be held liable as a trespasser. *See Roger de A.*, Y.B. 22 Edw. 3, fol. 14b, Mich., Lib. Ass. 43 (1348) (modern English paraphrase at http://www.bu.edu/phpbin/lawyearbooks/display.php?id=11792). *See also Yarborough v. The Governor and Company of the Bank of England*, (1812) 104 Eng. Rep. 991 (K.B.) (assuming corporation can be liable for aiding trespass); *Petrie v. Lamont*, (1842) 174 Eng. Rep. 424 (Assizes) ("All persons in trespass who aid or counsel, direct, or join, are joint trespassers").

international law of neutrality, and eagerness to prove its credibility as a new nation. 542 U.S. at 715–19; *see also* Dodge, *supra*, at 229–30. In doing so, they were partially motivated by a fear that state courts, which already had jurisdiction over such suits, could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations. *See* Dodge, *supra*, at 235–36. Thus, the First Congress desired to make federal courts *more accessible* for foreigners' tort claims. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 21 (1985).

Given these aims, the First Congress would not have limited accessorial liability to principles drawn from an external body of international law that did not generally prescribe rules of tort liability, when state courts were not so limited. Rather, they expected federal courts, like state courts, to apply the familiar body of general common law that, after all, already incorporated relevant aspects of the law of nations.

The incongruousness of applying international law standards of liability is underlined by the fact that many modern ATS cases also plead domestic common-law tort claims for the same conduct

implicated in the ATS claims. *E.g., Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, *6-7 (S.D.N.Y. Feb. 22, 2002). Liability for domestic law claims is typically determined by the common-law standard. *E.g., Pittman v. Grayson*, 149 F.3d 111, 123 (2d Cir. 1998) (recognizing knowing substantial assistance standard as New York tort rule for aiding and abetting). The First Congress would not have wanted a foreign diplomat, for example, who is able to benefit from the general aiding and abetting standard if he or she sues for ordinary assault in a New York court, to face a *higher* burden in federal court on a theory of aiding and abetting a breach of diplomatic inviolability. The panel's rule would disadvantage aliens' claims arising under the law of nations vis-à-vis their state law claims—thus frustrating the aims of the First Congress by "treat[ing] torts in violation of the law of nations less favorably than other torts." Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, at 14, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 110 (2004).

III. Under Federal Common Law, Aiding and Abetting Liability Requires Knowing, Substantial Assistance.

The ordinary common-law rule is embodied in the Restatement (Second) of Torts § 876(b) (1977), which requires only that one *knowingly* provide substantial assistance to a person committing a tort. *See Cabello*, 402 F.3d at 1158-59 (affirming ATS liability for knowingly providing substantial assistance); *Khulumani*, 504 F.3d at 287-89 (Hall, J., concurring) (ATS liability may be found for "knowingly and substantially assisting a principal tortfeasor," based in part on Restatement § 876(b)).

This knowledge standard has long been recognized. Indeed, some early cases suggest that liability for aiding and abetting torts was appropriate not only in the absence of specific intent, but even in the absence of actual knowledge. *See, e.g, Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 184-85 (Pa. 1786) (shipmaster held liable for aiding the commission of a tort when he had constructive knowledge that the action was trespass).[14]

---

[14] *See also Richardson v. Saltar*, 4 N.C. (Taylor) 505, 507 (1817) (co-defendants liable for aiding trespass despite lack of evidence that they knew principal perpetrator was acting without legal authority); *State v. McDonald*, 14 N.C. (3 Dev.) 468, 471-72 (1832) (defendants guilty of aiding and abetting

Additionally, in English common law, "there is cogent support both in principle and ancient authority for the suggestion that . . . [k]nowingly assisting . . . would suffice" for liability. John G. Fleming, The Law of Torts 257 (8th ed. 1993).[15] And when the First Congress passed a criminal statute outlawing piracy to comply with its obligations under the law of nations, it included criminal penalties for any person "who shall . . . *knowingly aid and assist*, command, counsel or advise any person" to commit piracy. Act of Apr. 30, 1790, ch. 9, §§ 9–10, 1 Stat. 112, 114 (emphasis added). In passing that law, Congress believed that it was merely codifying the law of nations, as it had been incorporated into the general common law. *See Sosa*, 542 U.S. at 719; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J.

---

wrongful arrest if they had constructive knowledge that warrant was invalid).

[15] *See also BMTA v. Salvadori*, [1949] Ch. 556 (defendant would be liable for inducing breach of contract if he knowingly entered into a contract inconsistent with the contracting party's obligations (citing *De Francesco v. Barnum*, (1890) 45 Ch.D. 430)); *Midland Rollmakers Ltd. v. Collins*, (1981) The Times, 18 June (Ch.) (bankers who "knowingly lent their aid and assistance to a fraudulent conspiracy" can be liable as members of the conspiracy).

Int'l L. 461, 477 & n.75 (1989).[16]

IV. Under Federal Common Law, Conspiracy Requires Evidence of Participation in a Plan With Knowledge of its Unlawful Aims, and Foreseeable Injuries.

Unlike criminal conspiracy, but like aiding and abetting liability, civil conspiracy is not an independent wrong but rather "a means for establishing vicarious liability for the underlying tort." *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983). In *Beck v. Prupis*, 529 U.S. 494 (2000), this Court "turn[ed] to the well-established common law of civil conspiracy" to define the elements of a civil RICO cause of action. *Id.* at 500. Thus, like aiding and abetting, civil conspiracy forms part of the general federal common-law principles of liability,[17] and it makes sense to look to these principles to determine who is civilly liable for conspiring to commit an ATS violation.

---

[16] Indeed, in a revision to the piracy statutes several years later, Congress explicitly criminalized "the crime of piracy, as defined by the law of nations." Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14.

[17] For example, in *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 n.3 (7th Cir. 1999), the court noted that "general principles of civil conspiracy apply" to claims under the federal False Claims Act.

The Second Circuit's decision below erred in at least two ways with respect to civil conspiracy. First, in borrowing joint criminal enterprise liability from international criminal law, the Second Circuit departed from a long line of cases concluding that civil conspiracy liability applies to ATS claims. *See, e.g.*, *Cabello*, 402 F.3d at 1159–60; *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (noting that the district court had allowed liability for conspiracy); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Eastman Kodak Co.*, 978 F. Supp. at 1091–92.

Second, the Second Circuit erroneously concluded that civil conspiracy could not be proven by evidence of the defendant's knowing participation in a wrongful scheme. The court found that civil conspiracy requires proof that the defendant acted "with the 'purpose' to advance the Government's human rights abuses." 582 F.3d at 260.[18] The court then considered evidence of Talisman's knowing participation in a scheme to commit abuses, but found this to be insufficient proof of the required

---

[18] The Second Circuit noted that joint criminal enterprise "require[s] the same proof of mens rea as . . . aiding and abetting," 582 F.3d at 260, *i.e.*, the "purpose" standard, and further noted that "plaintiffs would fare no better if we adopted . . . [common-law civil] conspiracy" rules, *id.* at 260 n.11.

"purpose." *Id.* at 262. This contravenes well-established rules of civil conspiracy liability.

In order to sustain a claim for conspiracy, the plaintiff must prove that "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159. The Eleventh Circuit went on to conclude that the defendant's liability for conspiracy could be established by evidence the defendant had knowledge of the conspiracy's plan and intended to help accomplish it, because a jury could have reasonably concluded that it was "foreseeable" to defendant that plaintiff would be tortured and killed by his co-conspirators, and could have reasonably inferred that defendant had "actual knowledge" that his co-conspirators were going to kill plaintiff. *Id.*

Similarly, in *Halberstam*, the D.C. Circuit found that defendant Hamilton, the "passive but compliant" partner of co-defendant Welch who killed a man in the course of a burglary, could be held liable for the killing as a co-conspirator based on evidence that she "knew" her co-conspirator was

engaged in illegal activities. 705 F.2d at 474, 486-87. The court found Hamilton liable for conspiracy based on three factual inferences: (1) that she "'knew full well the purpose of [Welch's] evening forays and the means' he used to acquire their wealth," *id.* at 486 (citation omitted); (2) that she "'was a willing partner in his criminal activities,'" *id.* (citation omitted), finding her "unquestioning accession of wealth" consistent with an agreement, *id.* at 487; and (3) that various of her acts "were performed knowingly to assist Welch in his illicit trade." *Id.* at 486.

An equivalent analysis was applied by the Sixth Circuit in *Hartford Accident & Indemnity Co. v. Sullivan*, 846 F.2d 377 (7th Cir. 1988). There, the court applied "general principles" of conspiracy law to determine whether there was sufficient evidence that an attorney had joined a continuing conspiracy to commit bank fraud. *Id.* at 383. Although there was evidence that the attorney had agreed in a plan to obtain one fraudulent loan, there was "no evidence" that this agreement extended to other fraudulent loans. *Id.* The court found evidence that the attorney knew of the ongoing fraudulent loans and "knowingly benefited from the continuation" of the scheme; this left "no doubt" that the attorney had joined the ongoing conspiracy, despite the lack of any direct evidence of the attorney's agreement in the overall scheme. *Id.* at 384. *See also State ex rel.*

Mays v. Ridenhour, 248 Kan. 919, 935 (1991) (concluding that knowingly participating "indicated a willful furtherance" of a wrongful scheme).

In none of these cases was specific evidence of "purpose" required. The Second Circuit failed to recognize that under common-law standards, conspiracy liability may be shown by evidence of participation, knowledge of at least one of a group's unlawful objects, and the foreseeability of the plaintiffs' injuries.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to grant *certiorari*.

DATED: May 20, 2010

Respectfully submitted,

MARCO B. SIMONS
Counsel of Record
RICHARD L. HERZ
JONATHAN G. KAUFMAN
EARTHRIGHTS INTERNATIONAL
1612 K STREET NW, SUITE 401
WASHINGTON, DC 20006
(202) 466-5188
Counsel for *amicus curiae* EarthRights International